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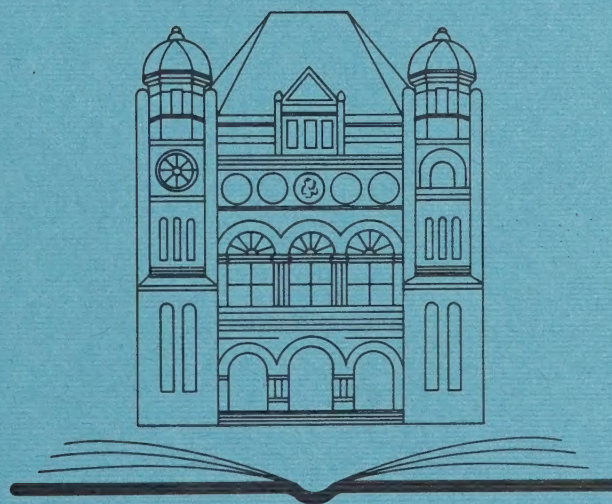
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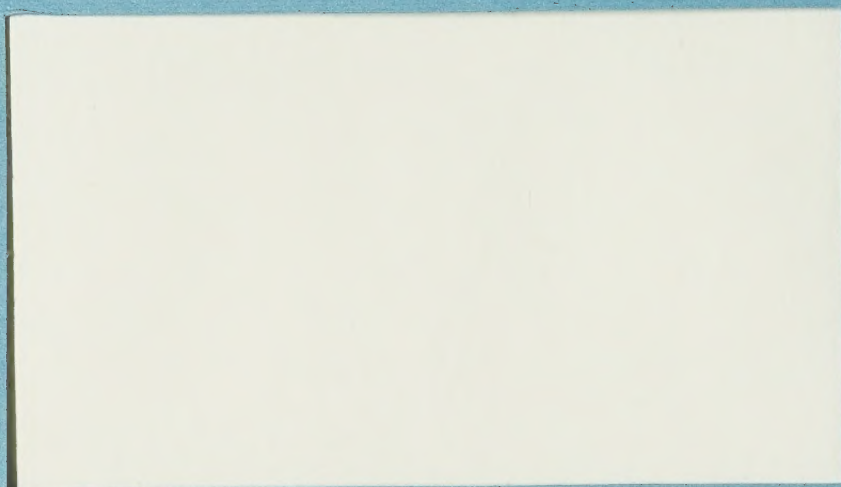
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**THE SOCIAL CHARTER:
EVOLUTION OF THE CONCEPT
IN RECENT CONSTITUTIONAL NEGOTIATIONS**

Current Issue Paper 129



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**THE SOCIAL CHARTER:
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Current Issue Paper 129

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INTRODUCTION

In North America, probably under the powerful influence of the American Constitution, constitutions are perceived as existing to protect the legal rights and freedoms of individuals. However, particularly in this century, with the expanding powers of government and of citizens' expectations of the state, people have seen a need to address broader rights to employment, education and health care, or the freedom to organize in unions. Constitutions and other official documents in countries around the world have come to contain references to social rights of various kinds. The specificity of these statements of rights varies greatly, as does their means of enforcement. However, it is fair to say that they are seldom "justiciable" (enforced by courts), but tend rather to express shared values and goals for governments.¹

Among the rich industrialized member states of the Organization for Economic Cooperation and Development, references to rights to education, social assistance and employment seem to be the most common, with more limited mention of health, housing, the environment and culture.² There are also regional and international conventions addressing social and economic rights; probably the best known are the European Social Charter and the International Covenant on Social, Economic and Cultural Rights. In the current round of general negotiations on the Canadian constitution, the so-called Canada round, the idea of a Social Charter for Canada came into prominence for the first time.

ONTARIO INITIATES DISCUSSION

The first specific proposal on the idea came in September 1991, when the Ontario Ministry of Intergovernmental Affairs released *A Canadian Social Charter: Making Our Shared Values Stronger*.³ The proposal was, as the title notes, framed in terms of stating the shared values of Canadians. Extensive public hearings, conducted by provincial committees and task forces as well as Keith Spicer's Citizen's Forum on Canada's Future, had made it clear that, whatever the level of cynicism and even despair over the future of the country, Canadians were interested in a constitutional

expression of common, shared values.⁴ Originally, these were to be expressed in a statement of general values in the preamble to the Constitution. With the release of the discussion paper, constitutional negotiations on values moved beyond this proposed "Canada Clause" and into an explicit statement of the commitment of governments to the economic and social programs which form Canadians' experience of the Canadian state.

Provisions of a Social Charter

The paper proposed that a Social Charter should be constitutionally entrenched, and would serve as a guide to governments as they develop and strengthen the social contract. It would comprise the following four basic elements. (The details of these elements would be determined after extensive public discussion.)

- A statement of the values and principles that Canadians wish to affirm and that should guide governments in social policy.
- Institutions for developing, protecting, negotiating, monitoring and enforcing policies that give concrete expression to these values and principles.
- A provision for broad public participation to ensure that policies, programs and services continue to be responsive to public need.
- A recognition that national sharing is required for realizing the Social Charter's principles across the country.

Entrenchment of a Social Charter

These principles could be entrenched in the Constitution in the following ways, either through each approach alone or through a combination of approaches:

- Entrench a general clause stating that the government of Canada and the provinces, in enacting laws and designing and implementing programs, shall strive to protect and promote the equal access of all to adequate health care, education, housing, income security, a clean and safe environment, and the basic necessities of life. Such a clause would not be enforceable by the courts but would include a large number of issues not easily identifiable as individual rights.

- Strengthen and make more precise s. 36 of the *Constitution Act, 1982*, which calls on governments to provide essential public services of reasonably comparable quality to all Canadians. An amended s. 36 could enumerate services to be provided and call on governments to enact laws or develop programs that would give concrete expression to these services. In certain areas, where programs are well-developed and public expectations well-defined, a clause could entrench the principles that these services should be provided equally to all and be publicly administered. Some elements of this option could be enforced by the courts.
- Entrench an obligation on governments to ensure social programs such as social assistance, pensions, education and unemployment insurance embody a specific set of norms or standards, possibly including comparable norms to those of the *Canada Health Act* (comprehensiveness, universality, portability, public administration and accessibility).
- Build on existing mobility rights in the Charter of Rights, expanding s. 6(2)(3) to protect the rights of Canadians to receive social assistance, health care, education and other social services in any province without special requirements. These rights would be enforceable by the courts.

Implementation and Enforcement of a Social Charter

The discussion paper argued that options for implementing and enforcing the Social Charter might include the following:

- Replacing the Senate with a new institution allowing provincial governments to have a more significant role in developing national social programs.
- Leaving details of institutional arrangements to federal-provincial negotiation. The Social Charter would only include a general clause requiring governments to implement principles included in the Charter.
- Making the enforcement of a Social Charter the prime function of a substantially reformed, elected Senate.

The discussion paper provoked a good deal of reaction, especially from social groups. For example, at the Ontario in Confederation Conference, held in October 1991, the idea of entrenching social rights in the constitution was endorsed by the workshops discussing the Charter of Rights, though there was less agreement on whether or not the right should be justiciable.⁵

The Social Charter Elaborated

Over the course of its hearings on the September 1991 federal proposals, the Beaudoin-Dobbie Committee heard from Premier Rae, who made detailed proposals to the Committee on February 13, 1992, on the form a Social Charter should take.

- It should be entrenched in s. 36 of the *Constitution Act, 1982* and should speak in terms of commitments of governments to meet social policy objectives.
- Building on the limited expression of social principles already included in s. 36, the following principles should be added to the s. 36(1) as items (d) to (h), to which the government of Canada and the provincial governments would be committed:
 - providing throughout Canada a health care program that is comprehensive, universal, portable, publicly administered and accessible;
 - providing social services and welfare based on need, so as to ensure that all Canadians have access to a minimum level of housing, food and other basic necessities;
 - providing high quality public primary and secondary education to all persons resident in Canada;
 - protecting, preserving and improving the quality of the environment within a sustainable economy; and
 - generally promoting the quality and standard of life of Canadians.
- The Social Charter should include a clause to ensure it operates in harmony with the *Canadian Charter of Rights and Freedoms*.
- Agreements by governments in the areas covered by the Social Charter should be constitutionally binding.
- To ensure governments are held accountable for decisions they take or fail to take in relation to the Social Charter, an independent commission should be established to monitor the implementation of the charter. This commission would:
 - be appointed jointly by Canada and the provinces;

- report annually on governments' progress in meeting Social Charter commitments, including intergovernmental agreements;
 - conduct public hearings on matters related to the Social Charter and examine questions related to the failure of governments to meet their Social Charter obligations;
 - make recommendations to governments in relation to their Social Charter commitments; and
 - establish expert panels to engage in research on specific social policy issues.
- Section 6 of the *Canadian Charter of Rights and Freedoms* should be amended to expand the current definition of mobility rights with respect to social benefits.
 - Intergovernmental decision-making should be made less restrictive, to allow for the development and harmonization of standards as soon as the majority of the provinces agree.

REACTION TO THE IDEA OF A SOCIAL CHARTER

Beaudoin-Dobbie Committee

The Special Joint Committee on a Renewed Canada was established in June 1991 to make recommendations on the federal government's proposals for a renewed Canada. These had been released in September 1991, and the Committee held a series of hearings around the country, and reported February 28, 1992. The Committee's final report addressed the idea of a "Social Covenant," though the federal government's September 1991 discussion paper had not done so. It recommended that the *Constitution Act, 1982* be amended by adding a new section 36.1, which would commit governments to fostering the following social commitments:

- comprehensive, universal, portable, publicly administered and accessible health care;
- adequate social services and social benefits;
- high quality education;

- the right of workers to organize and bargain collectively; and
- the integrity of the environment.

Compliance of governments would be subject to public review, including public hearings and public reports by a specialized commission. The Committee also addressed the economic union, to be entrenched in a new section 36.2, and to include:

- pursuing the goal of full employment; and
- ensuring all Canadians have a reasonable standard of living.

This also would be monitored by a specialized commission.⁶

Select Committee on Ontario in Confederation

The Select Committee on Ontario in Confederation held extensive hearings starting in February 1991, made an interim report in March 1991, and made its final report in February 1992. Not surprisingly, given that the proposal for a Social Charter had originated in Ontario, the Committee addressed the idea at some length. It recommended that the concept of a Social Charter should be embodied in an expanded s. 36 of the *Constitution Act, 1982* in the following terms:

- It should build on the principles found in s. 36, and uphold national standards and equitable access to programs involving but not limited to health care, education, social security and the environment;
- Its role should be to ensure the continued maintenance and development of our tradition of national standards in social programs.
- The principles of an expanded s. 36 could be monitored by a standing joint committee of the second chamber and House of Commons. This body could review proposed legislation or agreements or changes to existing agreements. It could also conduct systematic reviews of the adherence of governments to those principles.

- Adherence to an expanded s. 36 would primarily rely on the moral and political pressure which would result from the public scrutiny of government policies provided by this review process. However, the options for implementing and enforcing an expanded s. 36 should be further explored. The provisions of an expanded s. 36 should not be judicially enforceable.

Other Provincial Committees

Many committees and task forces in other provinces reported before or very soon after the detailed proposals on a Social Charter were made by Ontario in September 1991, and so do not address them specifically. However, several do have recommendations compatible with some of the Social Charter proposals. For example, the *Report of the Special Committee of the Legislative Assembly of Prince Edward Island on the Constitution of Canada* was submitted in September 1991. It recommended that national standards, fiscal equality and equalization should be entrenched in the Constitution.⁷ The Manitoba Constitutional Task Force, which reported in October 1991, recommended the constitutional entrenchment of a federal government obligation to fund the Established Program Financing program, and more generally supported a strong federal government and fiscal equalization.⁸ The Nova Scotia Working Committee emphasized that constitutional change should not jeopardize these powers.⁹ The New Brunswick Commission on Canadian Federalism supported the strengthening of s. 36 of the *Constitution Act, 1982* and that it be extended to identify more clearly the social goals that governments are committed to.¹⁰

Alberta's constitutional committee recommended against entrenchment. The Alberta Select Special Committee on Constitutional Reform reported in March 1992. It recommended that flexible legislative and other arrangements should be used to maintain Canada's social programs, and that nationwide standards should be set out in interprovincial agreements, rather than being entrenched in the Constitution.¹¹

TOWARDS AGREEMENT

Spring Conferences

A series of six conferences were convened by the federal government in February and March 1992, with participation by "ordinary Canadians," to make further recommendations on constitutional change. The report of the concluding conference of the five on the "Renewal of Canada" (the sixth, held in March, addressed Aboriginal issues) noted that, though it had not been in the federal proposals on the constitution, the Social Charter proposal had been raised many times over the course of the conferences. The delegates to the conference on the economic union, in particular, argued that social rights were inextricably tied to the economic union and to future economic development.¹² This argument, captured by the rapporteur's description of Canada as "an economic and social union,"¹³ became increasingly acceptable to negotiators.

"Offer to Quebec"

Over the spring and summer of 1992, a series of meetings were held to attempt to reach an agreement among the federal government, the nine provinces apart from Quebec, the territories and the national Aboriginal groups. Agreement was reached on April 29, 1992 that the entrenchment of "the principles of a social and economic union," would be included as part of the agreement which would constitute the "offer to Quebec."¹⁴

CHARLOTTETOWN AGREEMENT

A series of meetings among the federal government, the ten provinces, two territories and four national Aboriginal organizations were held in August 1992, which resulted in a Consensus Report. The agreement reached in August 1992 has "Canada's Social and Economic Union" as its second proposal on the Constitution, after the proposed Canada Clause. Its major elements are as follows.

- The clause will describe the commitment of the governments, Parliament and legislatures to the principle of the preservation and development of Canada's social and economic union.
- It will not be justiciable.
- Policy objectives set out will include, but not be limited to:
 - providing a comprehensive, universal, portable, publicly administered and accessible health care system;
 - providing adequate social services and benefits to ensure that all residents of Canada have reasonable access to food, housing and other basic necessities;
 - providing high quality primary and secondary education to all residents of Canada and ensuring reasonable access to post-secondary education;
 - protecting the right of workers to organize and bargain collectively; and
 - protecting, preserving and sustaining the integrity of the environment for present and future generations.

It should be noted that in the companion provision on the economic union, three of the five listed provisions could be perceived as part of a social charter. These policy objectives are listed as:

- the "goal of full employment;
- ensuring that all Canadians have a reasonable standard of living; and
- ensuring sustainable and equitable development."

This section of the agreement goes on to state that a mechanism to monitor the social and economic union provisions (since the courts will not be able to do so) should be determined by a First Ministers' Conference. Finally, there should be a clause stating that nothing in the social and economic provisions abrogates or derogates from the *Canadian Charter of Rights and Freedoms*.

CONCLUSION

This paper is written before the referendum on the Charlottetown agreement. As with many other aspects of that agreement, it is unclear whether the social charter elements will survive if Canadians reject the agreement as a whole. While one motivation for the proposal was to address shared values, another was to counteract decentralizing tendencies within the economy and in some of the proposed constitutional changes.¹⁵ Regardless of how these economic and constitutional trends develop, it is a considerable achievement to have brought constitutional entrenchment of social and economic rights to its present position in the Charlottetown agreement.

FOOTNOTES

¹ Ontario, Ministry of the Attorney General, Constitutional Law and Policy Division, *The Protection of Social and Economic Rights* (Toronto: The Ministry, 1991), p. 17.

² Ibid., p. 9.

³ Ontario, Ministry of Intergovernmental Affairs, *A Canadian Social Charter: Making Our Shared Values Stronger* (Toronto: The Ministry, September 1991).

⁴ See for example, Citizens' Forum on Canada's Future, *Report to the People and Government of Canada* (Ottawa: Minister of Supply and Services Canada, 1991), pp. 116-117.

⁵ Ontario in Confederation Conference, *Report to the Select Committee on Ontario in Confederation* (Toronto: The Conference, November 1991), pp. 37-39.

⁶ Canada, Parliament, Special Joint Committee on a Renewed Canada, *Report*, 34th Parliament, 3rd Session, tabled February 28, 1992, pp. 87-89.

⁷ Ted Wakefield, *A Comparative Summary of Key Constitutional Documents, Reports and Proposals*, Current Issue Paper No. 122 (Toronto: Legislative Research Service, Legislative Library, 1992), p. 84.

⁸ Manitoba Constitutional Task Force, *Report* (Winnipeg: The Task Force, 1991), p. 56.

⁹ *A Comparative Summary of Key Constitutional Documents, Reports and Proposals*, p. 85.

¹⁰ Ibid.

¹¹ Ibid., p. 94.

¹² Canada, Privy Council Office, Constitutional Conferences Secretariat, *Renewal of Canada Conferences* (Ottawa: Privy Council Office, March 1992), p. 13.

¹³ "Economic Union: Conference Report," in *Renewal of Canada Conferences*, p. 3.

¹⁴ Hubert Bauch, "Constitution: Breakthrough on a Social Charter," *Montreal Gazette*, 30 April 1992, p. B1.

¹⁵ *A Canadian Social Charter*, pp. 3, 12.



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